

TRANSWESTERN PIPELINE CO.

v.

ACTING DEPUTY ASSISTANT SECRETARY--INDIAN AFFAIRS (OPERATIONS)

IBIA 83-1-A

Decided October 28, 1983

Appeal from decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations), requiring tribal consent as a prerequisite to the approval of rights-of-way across tribal land.

Affirmed.

1. Indian Lands: Rights-of-Way--Rights-of-Way: Conditions and Limitations

In plain and unambiguous regulations codified at 25 CFR Part 169, the Secretary of the Interior has required tribal consent for any right-of-way across tribal land, not just those sought under 25 U.S.C. §§ 323-328 (1976).

2. Board of Indian Appeals: Jurisdiction--Regulations: Validity

The Board of Indian Appeals does not have authority to declare a duly promulgated regulation of the Department to be invalid.

3. Indian Lands: Rights-of-Way--Indian Tribes: Treaties--Rights-of-Way: Conditions and Limitations

Article IX, paragraph 6, of the Treaty with the Navajo, June 1, 1868 (15 Stat. 667), in which the tribe agreed not to oppose "the construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws

of the United States," may not be interpreted as bestowing tribal consent to all applications for rights-of-way across the Navajo Indian Reservation.

4. Indian Tribes: Treaties--Statutory Construction: Indians

Ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians.

APPEARANCES: Jeffrey B. Smith, Esq., Phoenix, Arizona, and James W. McCartney, Esq., Houston, Texas, for appellant.

OPINION BY CHIEF ADMINISTRATIVE JUDGE HORTON

Transwestern Pipeline Company, appellant, seeks review of an August 31, 1982, decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) (appellee). This decision held that consent of the Navajo Nation (tribe) was a prerequisite to Departmental approval of rights-of-way across tribal land for a natural gas pipeline and radio communications tower facilities.

Background

Appellant, a Delaware corporation with its principle place of business in Houston, Texas, has been found by the Federal Power Commission (FPC; predecessor to the Federal Energy Regulatory Commission) to be a "natural gas company" within the meaning of the Natural Gas Act, Act of June 21, 1938, 52 Stat. 821, 15 U.S.C. §§ 717-717w (1976). ^{1/} Pursuant to certificates of

^{1/} All further citations to the United States Code are to the 1976 edition.

public convenience and necessity issued after extensive hearings by the FPC, 2/ appellant operates a natural gas pipeline extending from the Panhandle-Hugoton area of Texas and Oklahoma and the Permian Basin area of Texas and New Mexico to pipeline facilities operated by the Pacific Lighting Gas Supply Company at the California-Arizona border, near Topock, Arizona. Appellant supplied approximately 675,000 mcf of natural gas per day to Pacific Lighting for distribution in Southern California in 1980. Present design would allow for the delivery of approximately 750,000 mcf per day.

Appellant's pipeline crosses lands held in trust by the United States for the Navajo Nation and certain individual Indians, including lands within the Navajo Indian Reservation. Appellant's 20-year right-of-way across tribal lands for the pipeline and appurtenant facilities was approved on April 24, 1961, by the Secretary of the Interior (Secretary), through his designated representative. On August 23, 1963, a second right-of-way was approved for a similar period of 20 years, with an effective date of October 5, 1961. The second right-of-way was for a radio communications tower and appurtenant facilities, used in connection with appellant's pipeline.

Appellant states that on November 26, 1979, it sought extensions of the existing rights-of-way from the Navajo Nation in accordance with 25 CFR 169.19. 3/ As evidence of its good faith and financial responsibility, appellant asserts that it deposited \$140,000 with the Navajo Area Office, Bureau

2/ See Opinion No. 500, 36 FPC 176 (1967); Opinion No. 500-A, 36 FPC 1010 (1967), 39 FPC 676 (1968); and Docket No. CP68-181 (Feb. 4, 1969).

3/ Departmental regulations found in 25 CFR were renumbered without substantive change on Mar. 30, 1982. See 47 FR 13327. The regulations currently in 25 CFR Part 169 previously appeared in Part 161. This opinion will use the Part 169 numbers.

of Indian Affairs (BIA). When appellant heard nothing from the tribe, it sought approval of the rights-of-way directly from BIA. Each application, dated August 24, 1981, sought a "right-of-way or renewal of right-of-way" under "the Acts of March 11, 1904, 33 Stat. 63, March 2, 1917, 39 Stat. 973, codified at 25 U.S.C. § 321 and the Act of February 5, 1948, 62 Stat. 17 codified at 25 U.S.C. § 323" (Applications at 1).

By letter dated January 21, 1982, the Acting Navajo Area Director advised appellant that, in accordance with Departmental regulations found at 25 CFR 169.3, "[i]t is clear that the Secretary has determined that Tribal consent is a condition necessarily attendant to the granting of a renewal." Section 169.3(a) states: "No right-of-way shall be granted over and across any tribal land * * * without the prior written consent of the tribe." The Acting Area Director's decision consequently advised appellant that its applications were being forwarded to the Navajo Nation for its consideration.

This decision was affirmed on appeal by the Acting Deputy Assistant Secretary--Indian Affairs (Operations) by letter dated August 31, 1982. Appellant's subsequent appeal to the Board was received on October 4, 1982. In urging reversal of appellee's position that tribal consent must be obtained for the requested rights-of-way, appellant argues:

1. The statutory authority for approval of the rights-of-way in question is found in 25 U.S.C. § 321. Under this statute the Secretary has the mandatory, non-discretionary duty to process the applications without imposition of a condition of tribal consent.

2. The regulations cited by appellee as requiring tribal consent were adopted pursuant to 25 U.S.C. § 323 and are not applicable to the granting of rights-of-way sought under 25 U.S.C. § 321.

3. The consent requirement set forth in Departmental regulations may not properly be applied to the Navajo Nation as it is not an Indian Reorganization Act tribe or a tribe from which Congress has otherwise deemed consent to be required.

4. The Department's consent regulations are invalid and cannot be relied upon.

5. Assuming the Secretary has discretion to require tribal consent, appellee's action in this case conflicts with the public interest and is arbitrary, capricious, and an abuse of discretion.

6. Tribal consent to rights-of-way such as those sought here can be found in the Treaty with the Navajo, dated June 1, 1868, 15 Stat. 667.

Discussion and Conclusions

Appellant's applications for new or renewal rights-of-way were filed under two acts. ^{4/} The Act of March 11, 1904, 33 Stat. 65, 25 U.S.C. § 321

^{4/} Appellant has argued on appeal that its applications "were filed primarily as a request for a new or original permit pursuant to 25 USC § 321." *See* Appeal, Oct. 1, 1982, at 5. The incongruity of this position and appellant's argument that the 1948 Act is inapplicable to its pending rights-of-way applications with the actual dual filing was addressed by the tribe in its answer to appellant's appeal. *See* Tribe's Answer Brief, July 12, 1982, at 2-4.

(1904 Act), authorizes the Secretary "to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation." The statute is silent as to whether tribal consent is required before the Secretary may grant a right-of-way. 5/

The Act of February 5, 1948, 62 Stat. 17, 25 U.S.C. §§ 323-328, commonly known as the General Rights-of-Way Act of 1948 (1948 Act), provides that the Secretary "is empowered to grant rights-of-way for all purposes, subject to such conditions as he may prescribe, over and across any" Indian trust lands. Section 2 of the 1948 Act, 25 U.S.C. § 324, provides that "[n]o grant of a right-of-way over and across any lands belonging to a tribe organized under * * * [the Indian Reorganization Act (IRA), 25 U.S.C. §§ 461-479] shall be made without the consent of the proper tribal officials." As the tribe notes, the 1948 Act was intended to dispel some of the confusion that had resulted from the prior practice of enacting specific legislation dealing with each separate type of right-of-way or easement. See Tribe's Answer Brief at 3.

Regulations implementing the various statutes authorizing the granting of rights-of-way across Indian lands are found in 25 CFR Part 169. 6/

5/ The only reference to "consent" found in the 1904 Act appears in the second proviso which concerns the construction of lateral lines across lands owned by individual Indian allottees.

6/ The statutory authority for the promulgation of Part 169 is stated to be "5 U.S.C. 301; 62 Stat. 17 (25 U.S.C. 323-328), and other acts cited in the text." Because it is clear that, among other acts, the 1904 Act is "cited in the text" in 25 CFR 169.25, the Board rejects appellant's contention that Part 169 was adopted pursuant only to 25 U.S.C. §§ 323-328, and is not applicable to rights-of-way sought or granted under 25 U.S.C. § 321.

Sections 169.1-169.21 are general provisions relating to all types of rights-of-way. Sections 169.22-169.28 deal with specific types of rights-of-way. Section 169.25 addresses rights-of-way granted for oil and gas pipelines. Subparagraph (a) states:

The Act of March 11, 1904 (33 Stat. 65), as amended by the Act of March 2, 1917 (39 Stat. 973; 25 U.S.C. 321), authorizes right-of-way grants for oil and gas pipelines across tribal, individually owned and Government-owned land. Rights-of-way granted under that act shall be subject to the provisions of this section as well as other pertinent sections of this Part 169. Except when otherwise determined by the Secretary, rights-of-way granted for such purposes under the Act of February 5, 1948 (62 Stat. 17; 25 U.S.C. 323-328) shall also be subject to the provisions of this section.

The section then sets forth specific requirements for pipeline rights-of-way.

[1] The Board finds that "other pertinent sections of this Part 169" in section 169.25 refers to those general sections found in 25 CFR 169.1-169.21 that are not inconsistent with the specific provisions of section 169.25. One such section is 169.3, which clearly and unambiguously requires tribal consent before any right-of-way across tribal lands, not just one sought under 25 U.S.C. §§ 323-328, can be approved. A second section incorporated by this reference is 25 CFR 169.19, the section under which appellant sought renewals of its rights-of-way from the tribe in 1979. This section clearly states that a renewal application which does not seek a change in status or location of a prior right-of-way may be approved by the Secretary "with the consent required by § 169.3." An application seeking to change the prior status or location is treated as a new application, to which section 169.3 would also apply.

[2] The Board therefore finds that the Secretary has, through regulation, made the policy determination to require tribal consent for any new or renewal right-of-way across tribal lands. The Board is bound by this determination because it does not have the authority to declare duly promulgated regulations of the Department to be invalid. Native Americans for Community Action v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 214, 90 I.D. 283 (1983); Zarr v. Acting Deputy Director, Office of Indian Education Programs, 11 IBIA 174, 90 I.D. 172 (1983).

Furthermore, the same question of whether the consent requirement of 25 CFR 169.3(a) could extend to any right-of-way across tribal lands, even when the pertinent statute was silent as to consent, was recently addressed by the Ninth Circuit Court of Appeals in Southern Pacific Transportation Co. v. Watt, 700 F.2d 550 (1983). The issue in Southern Pacific was whether tribal consent was a prerequisite to the approval of a railroad right-of-way application across the Walker River Paiute Reservation, sought under the Act of March 2, 1899, 30 Stat. 990, 25 U.S.C. §§ 312-318. In concluding that 25 CFR 169.3(a) applied and that the Secretary had acted within his power in requiring tribal consent for the acquisition of a right-of-way under 25 U.S.C. § 312, the court stated:

The district court held that the 1899 Act grants to a railroad the power of eminent domain to condemn rights-of-way through Indian reservations and that "[t]he concept of tribal consent as a precondition to the grant of a right-of-way is the very antithesis of the exercise of the power of eminent domain." The district court also held the 1899 Act to be a grant in praesenti subject to the performance of conditions precedent and conditions subsequent. Therefore, in the district court's view, the Act does not vest in the Secretary authority to establish grant preconditions beyond those contained in the statute but rather expressly specifies the conditions the Secretary must find to be satisfied

prior to approving an application. The Secretary and the Tribe challenge the district court's determination that the 1899 Act is a grant of the power of eminent domain and a grant in praesenti. They argue that Section 312 of the Act delegates to the Secretary authority to promulgate legislative rules and, thereby, the authority to establish grant preconditions by regulation. We conclude that the interpretation advanced by the Secretary and the Tribe is both reasonable and in accord with our obligation to construe the 1899 Act liberally in the Tribe's favor.

700 F.2d at 553.

The appeals court went on to observe, among other things, that the rulemaking authority set forth in the 1899 Act "would be superfluous if it did not confer authority to promulgate requirements, beyond those specified in the Act" (id.); that, like the General Rights-of-Way Act of 1948, the 1899 Act had as its purpose "the preservation and protection of Indian interests" (id. at 554) and, accordingly, that the Act's provisions could be construed in light of intervening legislation such as the 1948 Act which mandates tribal consent for rights-of-way across lands owned by IRA tribes; and that the regulation in issue "is not an abdication of the Secretary's power to administer the 1899 Act but rather an effort by the Secretary to incorporate into the decision-making process the wishes of a body with independent authority over the affected lands" (id. at 556). 7/

The Ninth Circuit's opinion in Southern Pacific was rendered during the pendency of the present appeal before the Board and subsequent to the

7/ This finding upholds the legality of the regulation requiring tribal consent for all rights-of-way across tribal lands. The Secretary's adherence to a legal requirement is not "discretionary" and cannot be arbitrary, capricious, or an abuse of discretion. The fact that the result in this case arguably conflicts with another public interest does not justify the disregard of law. The Secretary is bound by his regulations, which have the force and effect of law.

briefing period. Thus, the parties have not addressed the ruling. 8/ Regardless of particular differences between the 1899 Act interpreted in Southern Pacific and the 1904 Act at issue here, the Ninth Circuit's opinion confirms the general principle of law that the Secretary may, by regulation, require tribal consent for rights-of-way other than those sought under the General Rights-of-Way Act of 1948. 9/

Appellant also argues that, if tribal consent to the present rights-of-way is required, the Navajo Nation has already consented to this type of right-of-way by virtue of language found in the Treaty with the Navajo, June 1, 1868, 15 Stat. 667. 10/ Appellant points to Article IX, paragraph 6, of the Treaty of 1868 in which the tribe agreed not to oppose "the

8/ The Board notes, however, that appellant was aware of the Southern Pacific case, in which it appeared as amicus curiae.

9/ The Walker River Paiute Tribe is organized under the IRA. Appellant argues that even if the consent requirement could be applied under acts other than the 1948 Act, it cannot be applied to the Navajo Nation, which is not organized under the IRA. This argument is based on the observation that the requirement of tribal consent appears in 25 U.S.C. § 324, which addresses IRA tribes. The Acting Deputy Assistant Secretary addressed this argument at pages 3-4 of his Aug. 31, 1982, decision:

"Congress' policy of Indian self-determination extends to both IRA and non-IRA tribes, and the consent requirement for rights-of-way is one tool the BIA uses for advancing that policy. In addition, the consent requirement has been Departmental policy since 1951, a policy that the Department proposed abandoning in 1967. In response to this proposal, the House Committee on Government Operations recommended that '(t)he section of the present Indian right-of-way regulations (25 CFR 161.3 [now 169.31]) which requires consent of all tribes to right-of-way grants of their lands, regardless of how or whether they are organized, should be retained without modification The Secretary of the Interior should obey 25 CFR 161.3 and not grant rights-of-way in disregard of it on any pretext, even when he feels the Indians are withholding consent contrary to their own best interests.' Disposal of Rights in Indian Tribal Lands Without Tribal Consent, H. Rept. No. 91-78, 91st Congress, 1st Session (1969). Following the committee's recommendation, the Department abandoned its plans to amend 25 CFR §161.3 and has continued to require tribal consent to the granting of rights-of-way over tribal lands regardless of how the tribe is organized."

10/ See Kappler, 2 Indian Affairs Laws & Treaties, at 1018.

construction of railroads, wagon-roads, mail stations, or other works of utility or necessity which may be ordered or permitted by the laws of the United States." Appellant submits that its "facilities have been determined to be works of necessity and utility by virtue of the certificates of public convenience and necessity in evidence in this matter" and that under the Treaty the tribe "has consented or otherwise waived its consent to the construction and operation of the facilities to which Transwestern's Applications pertain and to the issuance of the requested rights-of-way" (Appeal Brief at 9). Appellant correctly observes that this argument was not discussed by the Acting Deputy Assistant Secretary in the decision under review.

Article IX, paragraph 6, of the Treaty with the Navajo is virtually identical to Article XI, paragraph 6, of the Treaty with the Sioux, April 29, 1868, 15 Stat. 635, in which the Sioux Tribe agreed not to object "to the construction of railroads, wagon-roads, mail-stations, or other works of utility or necessity, which may be ordered or permitted by the laws of the United States." ^{11/} The Sioux treaty provision was considered in United States v. 2,005.32 Acres of Land, 160 F. Supp. 193 (D.S.D. 1958), and was found not to constitute a waiver of tribal opposition to the construction of a dam and reservoir on tribal land even though the project was arguably a work of utility or necessity.

Although the treaty language relied upon by appellant has not been previously interpreted in connection with right-of-way privileges on the Navajo Reservation, the Treaty with the Navajo has been characterized by the

^{11/} See Kappler, 2 Indian Affairs Laws & Treaties, at 1002.

Supreme Court in general terms as an affirmation of tribal sovereignty over internal affairs of the reservation. In Williams v. Lee, 358 U.S. 217, 221-22 (1959), the Court stated:

No departure from the policies which have been applied to other Indians is apparent in the relationship between the United States and the Navajos. On June 1, 1868, a treaty was signed between General William T. Sherman, for the United States, and numerous chiefs and headmen of the "Navajo nation or tribe of Indians." At the time this document was signed the Navajos were an exiled people, forced by the United States to live crowded together on a small piece of land on the Pecos River in eastern New Mexico, some 300 miles east of the area they had occupied before the coming of the white man. In return for their promises to keep peace, this treaty "set apart" for "their permanent home" a portion of what had been their native country, and provided that no one, except United States Government personnel, was to enter the reserved area. Implicit in these treaty terms, as it was in the treaties with the Cherokees involved in Worcester v. Georgia, [31 U.S. (6 Pet.) 214 (1832)] was the understanding that the internal affairs of the Indians remained exclusively within the jurisdiction of whatever tribal government existed. [Footnote omitted.]

Similarly, in Southern Pacific, the court found that, as a sovereign entity, the Walker River Paiute Tribe had "independent authority to regulate the use of its own lands" (700 F.2d at 556).

[3] The Board agrees with the tribe in this case that so long as appellant chooses to do business on the Navajo Reservation, it is subject to the right of the Navajo Nation to exercise certain governmental powers over the reservation. A generalized treaty provision, such as the one found in the 1868 Treaty, is insufficient to constitute consent to any and all rights-

of-way, even for "works of utility or necessity," that might be sought through tribal lands. 12/

[4] This holding comports with "the fundamental postulate, enunciated in Worcester v. Georgia, see 31 U.S. at 393, that ambiguities in Federal treaties or statutes dealing with Indians must be resolved favorably to the Indians." Santa Rosa Band v. Kings County, 532 F.2d 655, 660 (9th Cir. 1975). See also McClanahan v. Arizona State Tax Commission, 411 U.S. 164, 174 (1973); Menominee Tribe v. United States, 391 U.S. 404 (1968).

Therefore, pursuant to the authority delegated to the Board of Indian Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision of the Acting Deputy Assistant Secretary--Indian Affairs (Operations) rendered August 31, 1982, is affirmed.

Wm. Philip Horton
Chief Administrative Judge

We concur:

Franklin D. Arness
Administrative Judge

Jerry Muskrat
Administrative Judge

12/ Cf. Cheyenne and Arapaho Tribes of Western Oklahoma v. Deputy Assistant Secretary--Indian Affairs (Operations), 11 IBIA 54, 58, 90 I.D. 61, 63 (1983), reconsideration pending. The Board held that a clause in a negotiated oil and gas lease stating that the parties agreed to "abide by any agreement for the cooperative or unit development of the field or area" constituted prior tribal consent to a communitization agreement found appropriate by the Secretary.